NO.72598-5

SUPREME COURT OF THE STATE OF WASHINGTON

JESSICA BRAAM, et al.

Respondents,

v.

STATE OF WASHINGTON, and the DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,

Appellants.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS

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REPLY TO PLAINTIFFS' RESPONSE

A. Introduction

This case was tried as a class action challenging the constitutionality of Washington's foster care program. The program, which is administered by the Department of Social and Health Services (Department or DSHS), is but one component of the child welfare system created by this state and its citizens in an attempt to improve the lives of children. Plaintiffs[1] have never disputed that the child welfare system in Washington is one of the best in the country and have never disputed that the vast majority of foster children in care are well served by the system. *See, e.g.,* RP 733-38, 1296-98.

The child welfare system in this state is continually under scrutiny – most often by workers and administrators of the Department, but also by the juvenile courts, the Governor's office, the Legislature, and others. The evidence of inadequacies in the system presented in this case was provided for the most part by current or former Department employees or by other state agents who have reviewed the administration of child welfare programs for the purpose of making recommendations for improvement.

Essentially, the issue in this case is whether a system that substantially conforms to the standards established by Congress and the Legislature is unconstitutional if, in its efforts to treat and care for some of

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[1] In their brief, Plaintiffs refer to themselves as both "Children" and "Plaintiffs". *See, e.g.,* Br. of Resp't at 1, 92. Because the class includes both children and adults, the Department refers to the Plaintiff class simply as "Plaintiffs."

the children who have been the most traumatized by their parents, it falls below the "best practice" standards established by private organizations.

REPLY TO COUNTERSTATEMENT OF THE CASE

A. Plaintiffs' Counterstatement Of The Case Should Be Read With A Careful Eye To What The Record Actually Says.

The Statement of the Case in Plaintiffs' Response Brief mischaracterizes the facts in the record and mirrors the way the case below was tried. Plaintiffs presented to the jury—and to this Court on appeal—a series of generalities and anecdotes describing the difficulties some foster children endure as a result of the lingering effects of the abuse and neglect they suffered at the hands of their biological parents. Plaintiffs apparently hope that this recitation will evoke such sympathy for foster children generally that the Court will be moved to decide the case on the basis of emotion rather than an analysis of the relevant facts and applicable law.

Moreover, evidently believing that the record as it actually reads will generate an insufficient level of pathos, Plaintiffs infuse virtually all of their references to the record with implications that are misleading, innuendoes that are unwarranted and, in some instances, statements that are just not true. Consider the following examples:

- Plaintiffs quote a sentence from a DSHS report as "confirming" a "concern" that foster children move "too often". Br. Resp't at 6. But the language quoted by Plaintiffs is the first sentence of an introductory section of the DSHS report titled "Placement Stability – How Often are Children

Moved between Foster Homes?" Reading the language quoted by Plaintiffs in context makes it clear that the statement is nothing more than an explanation of why DSHS was conducting the study of placement data. It doesn't "confirm" anything.

- Plaintiffs' brief goes on to note that the report "called for further analysis" (hardly a surprising recommendation from a researcher) but that "DSHS did not do further analysis", citing the testimony of Assistant Secretary Rosie Oreskovich for the latter proposition. Br. Resp't at 6. These statements imply that DSHS simply ignored the study, whereas Ms. Oreskovich's testimony demonstrated that in fact DSHS, in collaboration with others in the child welfare system, used the results of that study to develop the action agenda, Families for Kids. RP 2808.[2]
- On page 7, Plaintiffs cite one child's experience in foster care as having been identified in a 1995 report as "representative" of the difficulties facing the foster care system. In reality the report presented the anecdote as an "example" of a child

[2] Plaintiffs also ignore the statement that follows, explaining why further analysis is recommended, by noting the range of possible reasons for multiple placements that could be explored: "serious problem behaviors, . . . runaway behaviors [, or] limited foster/group home resources." Ex. 50 at 15-16. Plaintiffs' treatment of these passages—highlighting one and ignoring the other—is typical of another disingenuous approach that they employ throughout their brief. Plaintiffs rely on the data in various reports developed or commissioned by DSHS, as part of its ongoing effort to improve the system, as evidence of the Department's "disregard" of children in its care.

needing a permanent home. Ex. 30 at 4. The report did not suggest that the anecdote of one child's experience was "representative" of the experiences of all children in the foster care system.[3]

- On page 9, Plaintiffs' description of the one study that has been done of foster children who experience multiple moves is also misleading. They refer to the author's testimony that "children who are relatively healthy upon entry into foster care get worse as they [move] from one placement to another", Br. Resp't at 9, but omit any reference to the testimony from that same individual that only ten percent of the increased behavior problems he observed would be attributable to the multiple moves. RP 2477. Moreover, Plaintiffs completely ignore the witness's conclusion that children who come into foster care with significant behavior problems—as all of the Plaintiff class representatives did—do not evidence an increase in behavior problems associated with multiple placements. RP 2476.
- Pages 9 and 10 of Plaintiffs' brief include a statement that "Assistant Secretary Oreskovich 'generally' agreed with one of the leading experts on foster care (Dr. Vera Fahlberg) that 'multiple moves interfere with meeting the child's most basic

[3] Any suggestion along the lines that Plaintiffs imply would, of course, be false. Even Plaintiffs' own witnesses agree that the foster care system works well for 80 percent of the children who come into care. RP 733-38, 1296-98.

need for continuity and relationships.'" Br. Resp't at 9-10. This summary of Ms. Oreskovich's statement falsely implies that the quoted characterization of Dr. Fahlberg was Ms. Oreskovich's—which it wasn't—rather than that of Plaintiffs' counsel—which it was. RP 2856. Moreover, the summary completely omits any reference to Ms. Oreskovich's follow-up testimony to the effect that it is inappropriate to generalize in that way—as she stated: "I think it depends on the individual child. It depends on their temperament, their resilience, how they view it and how the foster parent reacted. I don't think there's a cookie cutter approach to this." RP 2857.

- Plaintiffs cite a 2001 DSHS study that notes that a "majority of children in foster care are placed away from their home school districts as nearby homes are unavailable." Br. Resp't at 10. Their brief goes on to state that "as a result, 60 to70 percent of children who 'graduate' from Washington's foster care system at age 18 never graduate from high school." *Id.* This statement is problematic in two respects. Juxtaposing these two statements implies that they refer to the same group of children—which is misleading in view of the testimony of Plaintiffs' own witness that the relatively small number of children who are in foster care when they turn 18 is a "different population of kids" than the far larger group of children who

> enter foster care at some point in their lives. RP 1500. What's worse, there is absolutely no basis in the record for the causal connection that Plaintiffs attribute to the two statistics. Their statement that the latter is "as a result" of the former is more than misleading—it's blatantly false.

Each of these mischaracterizations of the record—and the many others that can be found throughout Plaintiffs' brief—may seem minor when viewed in isolation. However, like the ship whose helmsman changes the vessel's heading one degree at a time, Plaintiffs' summary of the record in their brief ends up considerably off course.

B. Plaintiffs Have Failed To Prove Actual Injury To Themselves Or To Any Class Member.

The Brief of Appellant pointed out that "[w]here a trial court is asked to grant system-wide relief based on the violation of a constitutional right, the plaintiffs must prove actual injury to the named plaintiffs and widespread actual injury throughout the system." Br. of Appellant at 45, citing *Lewis v. Casey*, 518 U.S. 343, 348-49, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). Plaintiffs' recitation of facts is completely devoid of any reference to any evidence that any of the named Plaintiffs were in fact harmed at the hands of the Department.

Significantly, their bald statement that "[e]ach of the individual class representatives were injured" is set forth without *any* reference to the record. Cf. RAP 10.3(a)(4) ("Reference to the record must be included for each factual statement.") There is, of course, a simple explanation for

this omission—there was nothing in the record to which Plaintiffs *could* refer to support that statement. There is simply no evidence in the three thousand pages of the Record of Proceedings, the four thousand pages of Clerk's Papers or in the two hundred and fifty exhibits purporting to show that any of the named Plaintiffs—or any other specific member of the class—was injured because of the manner in which their individual situations were managed by the Department or its employees.

Plaintiffs attempt to gloss over this lack of evidence of actual harm by referring to general statements about children as an undifferentiated group. Thus "multiple placements can be 'emotionally devastating'" (Br. Resp't at 8); "children are harmed by multiple placements" (*Id.*); "[t]he emotional consequences of multiple placements or disruptions is likely to be harmful" (*Id.* at 9); etc. The underlying tenet of this approach is that proof of a mere possibility of harm to an undifferentiated group of people is sufficient to support a finding that individuals who may be within that group have likewise been injured.[4]

[4] In essence, Plaintiffs' argument, if transposed to the context of a typical personal injury case, would be as follows:

1. People who travel in automobiles more frequently than others are more likely to be injured in an automobile accident.
2. The plaintiff travels in an automobile more frequently than most of the population.
3. Therefore, plaintiff has more likely than not been injured in an automobile accident.

While such inductive reasoning might be sufficient to earn a passing grade in logical reasoning, far more would be required to justify a recovery in a personal injury case, and, consistent with *Lewis v. Casey*, 518 U.S. 343, 348-49, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996), more should be required here.

Plaintiffs' reliance on assertions about some undifferentiated group of class members rather than proof specific to the class representatives as the basis for their claims of injury frustrates the very purpose of a class action.

Two requirements of CR 23 are that the claims of the class representatives must be typical of, and common to, the claims of the class members. CR 23(a). This means that the representatives themselves must have suffered the same injury as the class they purport to represent. "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (citations and quotations omitted).

But the undisputed evidence in this case is that the class representatives were not injured:

- No class representative was subjected to an unnecessary change of placement;
- All class representatives received substantial state-funded mental health treatment;
- No class representatives were inappropriately or unnecessarily separated from their siblings, for any significant period of time;
- No class representatives were placed in homes where there were known dangers.[5]

[5] For a complete description of the experiences of the class representatives in foster care, with appropriate citations to the record, *see* Br. of Appellants at 14-23.

In short, because Plaintiffs' have not shown that the individual class representatives have been harmed, their claim must fail.

ARGUMENT

The Plaintiffs' goal in this lawsuit has always been to obtain a trial court order that would force the Legislature to appropriate more funds to the child welfare system.[6] Plaintiffs have cast about throughout these proceedings for a legal justification and a corresponding factual basis for such an order. As a result, their legal theories have changed time and time again throughout this case. They have changed again on appeal.

The prosecution of this case has suffered from the beginning from the Plaintiffs' failure to consistently and carefully describe the liberty interest upon which they base their claim. The right currently asserted by the Plaintiffs – the right of *all* children in state foster care to *reasonable safety and care* (Br. Resp't at 2)– was never asserted at trial. Whether there is in fact such a substantive due process right has not yet been determined by the United States Supreme Court. However, if the right had been so described at trial and if the trial court had relied on the guidance of federal appellate court cases in determining the proper culpability standard, the case would have been tried differently. More importantly, the result would have been different.

[6] In deposing a former DSHS secretary, the Plaintiffs elicited testimony that the former secretary supported class litigation as a tool for changing the system, because a court order would require the Legislature to allocate more funds to child welfare programs and, in her view, neither the Legislature nor the Governor would do that without litigation. "Children don't get priority in government . . . ." *See, e.g.,* CP 3199.

A. Plaintiffs' Legal Theory On Appeal, Like Their Legal Position At Trial, Is Inconsistent And Unpredictable. This Court Should Apply The Doctrine Of Judicial Estoppel And Prevent Plaintiffs From Asserting Yet Another New Position On Appeal.

The doctrine of judicial estoppel should be applied to bar the Plaintiffs from taking a position on appeal that is inconsistent with the position they successfully asserted at trial.

The United States Supreme Court recently applied the doctrine of judicial estoppel in *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). The Court stated:

> Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, 598 (6th Cir. 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," *United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993). *See In re Cassidy,* 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); *Allen v. Zurich Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir. 1982) (judicial estoppel "protect[s] the essential integrity of the judicial process"); *Scarano v. Central R. Co.,* 203 F.2d 510, 513 (3rd Cir. 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'" (quoting *Stretch v. Watson,* 6 N.J.Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," *Konstantinidis v. Chen,* 626 F.2d 933, 938 (D.C. Cir. 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990) (citation omitted).

New Hampshire, 532 U.S. at 750.

The Court held that the circumstances in which the doctrine is appropriately applied "are not reducible to any general formulation of principle" but that several factors typically should be considered. First, a

party's later position must be clearly inconsistent with its earlier position. Second, the party must have succeeded in persuading a court to accept that party's earlier position. And, third, the court should consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire*, 532 U.S. at 750-51.

Washington law is consistent with this view. In *Markley v. Markley,* 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948), this Court listed the following as elements which may be considered when applying the doctrine of judicial estoppel.

> (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.

See also Falkner v. Foshaug, 108 Wn. App. 113, 124-25, 29 P.3d 771 (2001).

Two significant changes in Plaintiffs' theory of the case are raised in their response to the state's opening brief.

The first is their assertion that this is not really a "multiple placement lawsuit," brought on behalf of a limited class of children, but is instead one that alleges a right on behalf of *all* foster children to conditions of reasonable care and safety. Br. Resp't at 2. This is a significant departure from Plaintiffs' previous position that "this lawsuit

is not about all foster care children . . . we are only [talking] about the children in the foster care system we represent", i.e., those who fit the class definition of having had three or more placements.[7] RP 227.

This change is important to the Department because, if the evidence and the relief sought are not limited to the foster children in the class, then the nature of the entire case has changed. The evidence presented on behalf of the Department would have been different and would have shown that the foster care system in Washington is successful for the vast majority of children in care, a proposition which Plaintiffs do not challenge. If this case had been brought on behalf of all foster children, the verdict would have been for the Department.

The second significant change is Plaintiffs' statement that the substantive due process right claimed by the Plaintiffs is the right to reasonable safety and care. Br. Resp't at 34.[8] Their statement that this description of the right has not changed and that even the "trial court correctly recognized that foster children . . . have substantive due process rights to reasonable care and safety," Br. Resp't at 34, is not (nor could it be) supported by citation to the record – because it is not true. In fact, the

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7.In fact, Plaintiffs successfully moved in limine to prohibit the Department from introducing evidence or making arguments relating to how well the Department serves or treats all other children in foster care. "We are talking about the class." RP 152. In granting the motion, the trial court cautioned that Plaintiffs needed "to make it very clear to the jury that they are talking about a class described as these children. And they are not condemning the foster care system as a whole." RP 157. Correspondingly, the court largely precluded the Department from adducing evidence that the foster care system functions well for the vast majority of foster children.

[8] Even this definition of the right is inconsistent with the right described in Plaintiffs' counterstatement of the issue and in other parts of their brief.

trial court cautioned the Plaintiffs' counsel: "I don't think you want to use the term 'reasonable care' [in the jury instruction defining the constitutional right] . . . . You won't win the suit that way." RP 3074.

1. The record in this case contradicts the unsupported assertions in Plaintiffs' response to the Department's opening brief.

The record clearly demonstrates that Plaintiffs claimed the substantive due process right was "a right to a stable and permanent home" or "a right to a safe, stable and permanent home" or "a right to be free from harm" or a right (based solely on the state's acceptance of legal custody) to "mental health treatment." For example: The sole reference to a substantive due process right in Plaintiffs' Second Amended Complaint, CP 4140-48, states the fundamental right is "a need and a right to a permanent and stable home." CP 4142.[9]

In their Memorandum in Opposition to Motion to Dismiss Substantive Due Process Claims, the Plaintiffs state:

> Plaintiffs make two separate but related substantive due process claims on behalf of the class. The first claim alleges that child abuse and neglect victims placed in the state's custody are entitled to be free from harm . . . . The second claim asserts that foster children must be provided with health care while in state custody and that their entitlement to such treatment includes a right to care for their serious mental health problems.

[9] The Second Amended Complaint was the operative complaint at the time of trial. Both the original Complaint, filed in August 1998, and the Amended Complaint, filed in November 1998—almost a year and a half before the First Amended Complaint—were identical to the First Amended Complaint on this point. CP 4167, 4175.

- CP 2256-57 (emphasis added).[10] The trial court denied the Department's Motion to Dismiss, and, agreeing with Plaintiffs, ruled that children in the class have a substantive due process right, although the right remained undefined. In their first proposed jury instructions, the Plaintiffs described the right by stating the Department has a duty to "protect plaintiffs from harm and they have an affirmative obligation to discover the needs of plaintiffs and to respond to those needs in an adequate manner." CP 969.
- Prior to trial, in discussing jury instructions, the Department asked Plaintiffs for clarification and a careful description of the right as required by the United States Supreme Court cases on substantive due process. RP 24. *See infra* at 25. Although the Department disagreed with the trial court's ruling on summary judgment, RP 24, it believed the trial court's ruling was that foster children in the class had the substantive due process right as pled in the Plaintiffs' Complaint, that is a right to "safe, stable and permanent homes," RP 24, and the Department submitted an instruction to that effect. CP 859. The Plaintiffs did not dispute that this instruction defined the right they were alleging and accepted this definition. The trial court also agreed this was the right alleged. The only dispute by the Plaintiffs with the instructions at that time, just prior to opening statements, was over the

[10] The Department successfully argued that there is no right to be "free from harm," as this would essentially hold the state to a perfection standard and render it strictly liable for accidental harm, and because there is no liability under 42 U.S.C. § 1983 for negligently inflicted harm. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

proper culpability standard to be applied in determining whether this constitutional right had been violated.[11] RP 31, 85.

- In their opening statement at trial, Plaintiffs' counsel told the jury that the court would be giving them instructions on the law and that the right involved would be described as "something to the effect that these children have a right to a safe, stable and permanent home and . . . if sick to get treatment." RP 232. Counsel continued:

> All we want is for children to have a safe, stable and permanent home. All we want is for children to have mental health care so they can get well. All we want is for children not to be harmed. . . . It's very simple.

RP 262.

- The case was tried, based on the understanding of the judge, the Department, and, seemingly, the Plaintiffs, that the constitutional right alleged was a right to a safe, stable and permanent home. The challenge to the "practice" of unnecessary multiple placements of children in the class was the essence of Plaintiffs' case.[12] It was not until final jury instructions were discussed – after seven weeks of trial, after all the evidence was in, and after both sides had rested – that Plaintiffs informed the court that the right they alleged was not a right to a safe, stable and permanent home. The entire exchange with the court is attached in Appendix A. In brief, it included the following:

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[11] The Department proposed an instruction stating "deliberate indifference" was the standard. CP 1014-15. The Plaintiffs successfully argued the standard was a substantial departure from professional judgment. RP 31.

[12] Throughout the trial, Plaintiffs' counsel referred to the case as the "multiple placement lawsuit." *See, e.g.,* RP 1370, 1381-82.

MR. MIDGLEY: . . . I'm sorry, Your Honor. I completely forgot that in the Defendants' D-5 that the court has essentially [accepted] it describes the constitutional right as the constitutional rights to substantive due process by depriving them of safe, stable and permanent homes. The cases say that *there is not a constitutional right to a safe, stable and permanent home.* We believe that that is error to instruct the jury that the constitutional right is to a safe, stable and permanent home. . . . *We think the right is to adequate treatment.* . . .

MR. FREIMUND: That's new to me. That's why I thought we lost our substantive due process summary judgment motion. That was a right that was asserted in their pleadings at the time and we lost. . . .

THE COURT: . . . I have had in my mind all along that . . . this is what we have been talking about.

MR. MIDGLEY: Well, we did not intend to mislead anybody about it. If you look at our briefing on the substantive due process, we consistently rely on the *Youngberg* standard which is not a right to a safe, stable and permanent home. *It's a right to reasonable treatment in the State's care* . . . .

THE COURT: I don't' think that you want to use the term "reasonable care". . . . You won't win the suit that way. . . .

MR. MIDGLEY: The *Youngberg* case says *people in the State's care have a right to safety.* . . .

THE COURT: Well, I feel a little dumb because I thought this case was always about what we just talked about in the instruction that was D-5.

MR. MIDGLEY: I think, Your Honor, it is about that. I think that's certainly relevant. . . [W]e can use it as perhaps a standard that I know forms the constitutional standard.

All I'm saying is there is no – the cases say . . . there is no constitutional right to a safe, stable and permanent home. I am just an attorney protecting my appeal, frankly. And I think we do have the burden and maybe we haven't done it as well as the Court would like, we have the burden of describing the right and we are happy to try to do it in a better manner if we haven't. . . .

THE COURT: . . . So, Mr. Freimund, if that comment is right then what is the – how would you phrase this?

> **MR. FREIMUND:** Like you, Your Honor, I thought this is how we were trying the case all along . . . and we moved for summary judgment and they opposed it and said, no, [the constitutional cases are] distinguishable, the right is a constitutionally protected right and we are entitled to go to the jury with it and that's how I thought we were trying the case.
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> **THE COURT:** That's what I thought.

RP 3072-78 (emphasis added).

The trial court and the Plaintiffs rejected the Department's definition of the right as the constitutional right to minimally adequate treatment, and rejected the Department's argument that "deliberate indifference" was the liability standard to be applied in determining whether a violation of any constitutional right was occurring. Instead, the trial court and the Plaintiffs used the *Youngberg* culpability standard to create a new constitutional right described as the right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice." CP 751, 752 This was error.

In response to the Department's opening brief, Plaintiffs now argue that what they meant all along, and what everyone – except the Department, the jury and the trial judge – knew was that the constitutional right claimed was *not* the right described to the jury, but a right that they now broadly describe as a right to "reasonable care." Plaintiffs are playing fast and loose with the courts and should be estopped from now taking a position that is inconsistent with the right they asserted in their complaint, argued at trial, and described to the jury.

The factors discussed in *New Hampshire,* 532 U.S. 742, and those set forth in this Court's opinion in *Markley*, 31 Wn.2d 605, are met in this case. (1) The Plaintiffs' position on appeal, that the constitutional right is one of reasonable care, is inconsistent with the right they relied on in instructing the jury; (2) a judgment was rendered in favor of the Plaintiffs based on their previous position; (3) the positions are clearly inconsistent in that the Plaintiffs now agree that the right defined for the jury is not a substantive due process right, but a liability standard; (4) the parties and the issues are the same; (5) the Department has been misled and has been unable to adequately present evidence or argue a theory of the case based on the Plaintiffs' current position, let alone a fundamental liberty interest that is carefully described; and (6) it is patently unfair to permit the Plaintiffs to change their position at every stage of the proceedings, depending on what they view as currently beneficial, refusing to consistently define the substantive due process right that they claim the Department is violating.

This Court should decide this case on the record before it, not the record that Plaintiffs could have created, or may now wish they had created. Because foster children have no substantive due process right as defined in the jury instructions—that is a constitutional right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice"—the trial court should be reversed, with directions to dismiss the Complaint with prejudice.

B. The State Has *Never* Taken The Position That Children In State Foster Care Do Not Have A Right To Reasonable Safety And A Right To Adequate Food, Shelter, Clothing, And Medical Care.

Even under Plaintiffs' new theory of the case, describing a different substantive due process right upon which they base their cause of action, the Plaintiffs again fail to carefully describe the liberty interest they allege.

The Department has never argued that children in state foster care do not have a right to reasonable safety and a right to adequate food, shelter, clothing and medical care. Whether this right, which is grounded in state statute and tort law, rises to the level of a constitutionally protected right, based upon a fundamental liberty interest, is uncertain. The United States Supreme Court has not yet considered the issue and the issue was never addressed in this case. Any claim that the individual class representatives may have had that this right was violated was resolved when their tort claims were settled.

Plaintiffs described the substantive due process right in many ways throughout the trial – but never as a right to reasonable safety and care. The right claimed at the end of the trial, and upon which the jury was instructed, was described "to be treated in a manner which does not substantially depart from professional judgment, standards or practice." CP 751, 752. As Plaintiffs now appear to acknowledge, this "right" is not a fundamental right that has been recognized by the United States Supreme Court, nor by any federal court for that matter. Instead, it is a

culpability standard that the Plaintiffs and the trial court erroneously turned into a substantive due process right.

Plaintiffs' Brief in Response now seems to argue the right at issue is a right to "reasonable safety" or "reasonable care" or "reasonable safety and care" or "to be treated according to certain [unidentified] standards"; but then, in arguing in support of the injunction and the trial court's evidentiary rulings, Plaintiffs argue that the right is "to be treated in a manner which does not substantially depart from professional judgment, standards or practice."

In essence, Plaintiffs now appear to be arguing that a departure from a reasonable standard of care – *negligence* – is the constitutional right involved. This is not, nor should it be, the law. The constitution is not a "font of tort law." *County of Sacramento v. Lewis*, 523 U.S. 833, 848, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (quoting *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d (1976)). *See also Daniels*, 474 U.S. at 328 (liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process).

C. The Proper And Necessary Analytical Approach To Determining Any Substantive Due Process Claim Requires (1) A Careful Description Of The Fundamental Liberty Interest Involved And (2) Application Of The Proper Culpability Standard. No Such Analysis Occurred In This Case.

Plaintiffs rely solely on the 1982 United States Supreme Court opinion in *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73

L. Ed. 2d 28 (1982), a case involving an adult involuntarily confined in a mental institution.

While *Youngberg* is a significant opinion, the extent of its application to children in state foster care must be considered in light of substantive due process decisions rendered by the Supreme Court during the 20 years since *Youngberg*.[13]

The Supreme Court requires that a court ruling on a substantive due process claim must: (1) carefully describe the fundamental right or liberty interest claimed to be protected by the substantive due process clause, *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d (1993), and (2) determine that the conduct alleged to violate the right is so egregious or arbitrary, in a constitutional sense, that it shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. at 847.

These two requirements of every substantive due process analysis were applied by the Court in *Youngberg*, as well as by federal appellate courts that have considered alleged violations of substantive due process rights of foster children. However, they were not applied in this case. They were not part of the Plaintiffs' presentation at trial and they are not a focus of its argument on appeal.

[13] As demonstrated in the Brief of Appellants at 34-37, foster children are not in "custody" in the same sense as are adults who are involuntarily confined in a mental institution. Thus the propriety of even viewing the *Youngberg* case as analogous to this case, never mind applying it in the manner that the trial court did below, is questionable.

1. The substantive due process right articulated in *Youngberg*, and subsequent federal appellate court cases involving foster children, is not a right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice."

Plaintiffs' *current* argument is that foster children have substantive due process rights to reasonable safety and care, and that this right has long been recognized by federal cases. However, the right identified in this case and described to the jury was not a right to reasonable safety and care, but, instead, was a right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice."

In *Youngberg*, the Supreme Court held that a mentally retarded adult who was involuntarily confined in a mental institution because of his mental disabilities and dangerous propensities had substantive due process rights to safe conditions of confinement and to freedom from unreasonable physical restraint. *Youngberg*, 457 U.S. at 315-16. It also held that, based on these articulated liberty interests, the state had a "duty to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Youngberg,* 457 U.S. at 319. In carefully describing the fundamental liberty interests of the plaintiff, the *Youngberg* Court established the first prong of the analytical process required in substantive due process cases.

Youngberg goes on to describe the required minimally adequate training as "such training as may be reasonable in light of the respondent's liberty interests in safety and freedom from unreasonable restraints."

Youngberg, 457 U.S. at 321.[14] What is "reasonable" training, i.e., that which is sufficient to meet the minimally adequate threshold, depends, for the most part, on the opinion of professionals dealing with the confined individual. "[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards *as to demonstrate that the person responsible actually did not base the decision on such a judgment*." *Youngberg*, 457 U.S. at 323 (emphasis added).[15]

In establishing this culpability standard against which the conduct of the state is to be measured in these circumstances, the *Youngberg* Court established the second prong of the required analysis.[16]

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[14] The "training" to which the *Youngberg C*ourt referred was "habilitation", or "training and development of needed skills" to further the involuntarily committed person's safety and freedom of restraint. *Youngberg*, 457 U.S. at 318. The Court noted that the term was had been used interchangeably with the term "treatment" in the decision under review in *Youngberg. Id*. at 319, n. 24.

[15] The Plaintiffs have never argued, nor could they, that *no* professional judgment was exercised when the various social and political decisions they challenge occurred. Instead, their argument essentially was, and continues to be, that different professional judgments should have been made using Child Welfare League of America's "Standards of Excellence" or other "best practice" standards.

[16] The *Youngberg* Court took pains to differentiate between a "deliberate indifference" standard and that which it adopted ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg,* 457 U.S. at 321-22.) In more recent cases, however, the Supreme Court has indicated that imposing liability only if there is a complete failure to use some level of professional judgment in making a decision is equivalent to a deliberate indifference or shocks the conscience standard. *See* for example, *County of Sacramento v. Lewis*, 523 U.S. at 852, n. 12. As discussed more fully below at 34-35, the federal appellate cases applying *Youngberg* in the foster care setting and relied on by Plaintiffs for other purposes have employed a deliberate indifference liability standard. *Yvonne L. v. New Mexico Dep't of Human Servs.,* 959 F.2d 883, 894 (10th Cir. 1987) (applying the professional judgment standards but equating it to deliberate indifference.)

Youngberg's reasoning clearly applies to an individual who is involuntarily confined to a mental institution and whose liberty and freedom to act is "massively curtailed." *See Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972). While the Department may agree that foster children in its legal custody have a right to reasonable safety and care, based on state law,[17] whether a child's *liberty interest* is implicated by a transfer of legal custody from the parent to the state has not yet been determined by the Supreme Court.[18]

The Plaintiffs have failed to describe how the liberty of a child is infringed by the state's acceptance of legal custody of a child. The nature of any "infringement" on the freedom or liberty of a child in the legal custody of the Department is more similar to that of a child in the legal custody of a parent than to that of a person involuntarily confined to a mental institution. The nature and scope of a state's responsibilities in protecting the constitutional rights of any individual in state care – foster child or mental health patient – are directly related to the nature of the custodial relationship and the reason for and extent of any restraint on

[17] Foster children in Washington have a right to sue the state for damages, unlike children in many other states where sovereign immunity has not been waived and where the only avenue of relief is a constitutional challenge in federal court. The named Plaintiffs in this case were compensated for their damages pursuant to a settlement agreement. Where there is a remedy in tort available, a constitutional remedy need not be found. For example, in *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), the Court held that where common law or statute provided a tort or criminal remedy to school children whose liberty interests in being free from unreasonable punishment were violated, there was no additional process due.

[18] In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 n. 9, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), the Supreme Court expressly stated that it was not deciding the issue in that case.

liberty. *Youngberg*, 457 U.S. at 318-19. A state "necessarily has considerable discretion in determining the nature and scope of its responsibilities" in this regard. *Youngberg*, 457 U.S. at 317. This should be particularly so where the state acts in place of a parent.

The only substantive due process rights identified in *Youngberg* that might, by analogy, apply to foster children, are the rights to reasonably safe conditions of "confinement" and adequate care.

Federal appellate courts that have considered whether a foster child has a substantive due process right protected by the 14th Amendment have, like the Court in *Youngberg*, first carefully defined the right involved. No federal appellate court has held that children in foster care have a constitutionally protected fundamental liberty interest in being treated "in a manner which does not substantially depart from professional judgment, standards or practice." No federal appellate court has held that by virtue of being in the legal custody of the state, a foster child has a constitutional right to mental health treatment, let alone optimal treatment or treatment that results in a "cure."[19] *See, e.g., Roska v. Peterson*, ____F.3d____ (10th Cir. 2002) (There "are two circumstances in which the state may be liable for failing to ensure the safety of children in its care. First, the state may be liable when a state actor shows 'deliberate indifference to the serious medical needs' of a child who is in state custody. Second, a state may be

[19] The Department agrees that *Youngberg* would apply to a foster child (or adult) who is involuntarily committed to a state mental institution because of a mental impairment. *See, e.g.,* Br. Resp't at 36 (citing, for example, *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239 (2nd Cir. 1984)).

liable when state actors 'place children in a foster home or institution that they know or suspect to be dangerous to the children,' if harm actually occurs" (citation omitted)); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (foster children have a "right to be reasonably safe from harm; that if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children, they incur liability if the harm occurs")[20]; *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (the liberty interests of a foster child are the right to be free from the infliction of unnecessary pain and the right to physical safety); *White v. Chambliss,* 112 F.3d 731 (4th Cir. 1997) (children in foster care have a right to reasonable safety); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (foster children have the "right to be free from the infliction of unnecessary harm in state-regulated foster homes"); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994); *Burton v. Richmond*, 276 F.3d 973 (8th Cir. 2002) (foster children have a right to have the state provide for their basic human needs of "food, clothing, shelter, medical care and reasonable safety"); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993).

K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990), upon which the Plaintiffs rely, held that there is no constitutional right to a stable foster

[20] B*ut see Miller v. Gammie*, 292 F.3d 982, 990-91 (9th Cir. 2002) (state social workers held absolutely immune from liability in a 42 U.S.C. § 1983 suit based on the workers knowingly placing a sexually aggressive youth in a foster home where the youth later sexually abused the foster parents' child).

home environment. *K.H.,* 914 F.2d at 853. The court defined the substantive due process right of a foster child as "the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, *whom the state knows or suspects to be a child abuser."* *K.H.*, 914 F.2d at 852 (emphasis original). In considering the "general practice" of multiple foster care placements, the court in *K.H.* discussed, in *dicta*, some of the problems that occur in foster care systems, as Plaintiffs note in their brief. Br. Resp't at 39. In addition to the statements quoted in Plaintiffs' brief, the court stated:

> Whether the federal courts can solve the underlying problem or even treat the symptoms effectively may be doubted. Although *Youngberg* establishes an intelligible standard of liability . . . the underlying problem is not lack of professional competence but lack of resources, a problem of political will unlikely to be soluble by judicial means. Good foster parents are difficult to find, unless they are paid generously; good institutional care is expensive too. The needs of neglected, abused and abandoned children compete with other demands, both public and private, for scarce resources. The allocation of the nation's—even of a single state's—resources is not a realistic assignment for the federal courts.

K.H., 914 F.2d at 853.

There was no cognizable substantive due process right alleged or described in this case at the trial court level. The Plaintiffs had ample opportunity at trial to carefully describe a recognized substantive due process right on behalf of foster children. They declined to take advantage of that opportunity and objected to the Department's attempts to properly describe the right.

Because Plaintiffs failed to articulate a constitutionally protected liberty interest, the Department's motion for summary dismissal of the substantive due process claim, and its CR 50 motion at the end of trial should have been granted. On this basis, the trial court decision should be reversed, with directions to dismiss the complaint with prejudice.

2. The liability standard established by the United States Supreme Court in substantive due process cases, and recognized by the federal appellate courts, is a "deliberate indifference" or "shocks the conscience" standard.

Plaintiffs argue that *County of Sacramento v. Lewis*, the Supreme Court's most recent decision articulating the culpability standard in substantive due process cases, does not apply to persons in state "custody," Br. Resp't at 43-44, and, additionally, even if it does apply, a jury does not need to be instructed as to what the liability standard is.[21] Br. Resp't at 44.

The Plaintiffs are wrong on both counts.

a. The federal appellate courts that have applied a *Youngberg*-type analysis to the foster care setting have adopted the deliberate indifference or shocks the conscience culpability standard.

The Supreme Court has not determined what liability standard would apply, if it were to recognize a substantive due process right due to children in state foster care. However, in *Sacramento,* the Court held:

> Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference

[21] At trial the Department requested a jury instruction describing the culpability standard as requiring proof of "deliberate indifference." CP 1014, 1015.

> that shocks in one environment may not be so patently egregious in another[.]

County of Sacramento v. Lewis, 523 U.S. at 850.

An application of the *Youngberg* culpability standard to a case involving substantive due process rights of foster children would be a "mechanical application in unfamiliar territory" and would not meet the standard set by *Sacramento.*

Plaintiffs' suggestion that federal cases support a less stringent standard than that required by *Sacramento* is misleading and wrong. Br. Resp't at 45 (asserting that the trial court, in formulating the jury instruction, "correctly rejected the [deliberate indifference] standard . . . looking to *Youngberg* and *the federal courts' application of its holding to children in state run foster care*" (emphasis added)).

Just the opposite is true. Every federal appellate court that has considered the issue has applied the deliberate indifference/shocks the conscience liability standard. Although Plaintiffs rely on these same cases in now arguing that children in state foster care have a substantive due process right to reasonable safety and care, Br. Resp't at 34, they fail to inform this Court that not one of these cases supports their argument that the United States Supreme Court's "shocks the conscience" or "deliberate indifference" standard is not the proper standard in substantive due process cases involving foster children.

The Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits all hold that "deliberate indifference" is the culpability

standard applicable in determining whether there has been a violation of a foster child's substantive due process rights. *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134, 145 (2nd Cir. 1981); *Nicini v. Morra,* 212 F.3d 798, 809-13 (3rd Cir. 2000) (expressly discussing *County of Sacramento v. Lewis* as it applies to the foster care setting and noting that "in the foster care context, most of the courts of appeals have applied the deliberate indifference standard"); *Chambliss*, 112 F.3d at 737; *Lintz*, 25 F.3d at 306 (noting that deliberate indifference is "the prevailing standard now being applied" in cases alleging substantive due process violations in foster care); *Kitzman-Kelley v. Warner*, 203 F.3d 454, 459 (7th Cir. 2000); *K.H.*, 914 F.2d 846; *Burton*, 276 F.3d 973; *S.S. v. McMullen*, 225 F.3d 960, 964 (8th Cir. 2000) (culpability standard is a "shocks the conscience" standard and may, depending on the circumstances, be "deliberate indifference"); *Roska*, ___F.3d___ (10th Cir. 2002); *Yvonne L.,* 959 F.2d at 894 (apply the *Youngberg* "professional judgment" standard, but equating it with deliberate indifference). *Taylor*, 818 F.2d 791.

There is no authority to support Plaintiffs' argument that a standard other than deliberate indifference was the proper standard in this case.

b. The erroneous instruction prejudiced the Department

Plaintiffs then inexplicably claim that "the State asserts no prejudice" from the erroneous instruction that was given to the jury. Br. Resp't at 47. This is simply not true. They also incredulously argue

that no prejudice could have resulted since "the State knew what the instructions would say" before closing arguments . Br. Resp't at 47.

In its opening brief at pages 66-67, the Department demonstrated that the trial court erroneously created a constitutional right and failed to accurately explain the proper liability standard to the jury. This was an error of law. Citing to *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (a clear misstatement of the law is presumed to be prejudicial), the Department's opening brief states the "instructions are presumptively prejudicial and are, in fact, prejudicial to the Department." Br. of Appellant at 67. Plaintiffs have not, and cannot, overcome that presumption.

Had the trial court and the Plaintiffs properly and clearly defined the fundamental liberty interest involved and had they recognized the proper culpability standard, the case would have been tried differently – and would have been decided differently.

3. Even if *Youngberg* is held to apply by analogy to children in the legal custody of the Department, the trial court erred in its application of *Youngberg.*

Assuming, solely for purposes of argument, that the liberty interest of children in the legal custody of the state is analogous to that of an adult who is involuntarily confined to a mental institution, and that the holding in *Youngberg* applies, by analogy, to foster children, the trial court erred in failing to properly describe the right and the liability standard.

Arguably, the applicable right stated in *Youngberg* is the right to reasonably safe conditions and a corresponding duty on the part of the

state to provide minimally adequate care to ensure the right to safety is not violated. *Youngberg*, 457 U.S. at 322.

The Department asked the court to instruct that the constitutional right involved right was a right to minimally adequate care or treatment. RP 3090. The trial court refused to give this instruction, after hearing all the evidence, and essentially stated that, if the jury was instructed that the right was to "minimally adequate care" the Plaintiffs would lose. RP 3090.

> This Court has held that, even in mental institutions, where the *Youngberg* standard clearly applies, the Court's "duty is to ensure that an individual's treatment does not fall below that required by due process."

In the Matter of the Detention of J.S., 124 Wn.2d 689, 700, 880 P.2d 976 (1994).

The constitutional standard is not, as Plaintiffs suggest, a right to be treated in a manner consistent with a best practice standard.

> [T]he Constitution is a charter of negative rather than positive liberties . . . The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services.

DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

The right recognized in *Youngberg* was not to optimal care, but to minimally adequate care or treatment, sufficient to protect the liberty interests that are threatened. When that treatment is due a patient who is

involuntarily confined to an institution, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards *as to demonstrate that the person responsible actually did not base the decision on such a judgment*." *Youngberg*, 457 U.S. at 323 (emphasis added).

Even though the Department believes this is an incorrect statement of the law with regard to foster children, if the alleged substantive due process right and the liability standard had been so described, this case would have been decided in favor of the Department – on summary judgment, on the state's CR 50 motion, on a directed verdict, or on a jury verdict.

D. The Plaintiffs Rely On An Incorrect, And Now Repudiated Definition Of The Alleged Substantive Due Process Right In Arguing In Support Of The Trial Court's Evidentiary Rulings.

In their attempt to justify the trial court's erroneous evidentiary rulings in this case, the Plaintiffs revert to the "constitutional right" to be treated according to a set of professional standards – again confusing an incomplete statement of a constitutional liability standard with the constitutional right itself. The trial court's evidentiary rulings were based on an erroneous understanding of the right involved and of the standard for proving a violation of the right.

Evidence of long past conduct of the Department. Plaintiffs first claim that the Department should be foreclosed from challenging the trial court's ruling on a motion in limine which permitted Plaintiffs to introduce evidence of circumstances that occurred in foster care far in the

past. Plaintiffs argue that the Department subsequently "invited" any error relating to the trial court's ruling when it proposed jury instructions which attempted to temper the harm of the erroneous evidentiary ruling. Br. Resp't at 50.

The doctrine of invited error "prohibits a party from *setting up an error* at trial and then complaining of it on appeal." *In re Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000), quoting *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999). *See also Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 113, 52 P.3d 485 (2002). The Department did not set up the error, but in fact moved in limine to exclude the evidence. CP 1355.

The issue was whether Plaintiffs could prove that *current* or *existing* conduct on the part of the Department is presently causing harm to the class, so as to justify entry of an injunction proscribing *future* conduct. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). The only relevant focus in an action for mandatory injunction is what is happening now and whether an injunction is warranted to change *current* conduct. *Rumbolz v. Public Util. Dist. No. 1*, 22 Wn.2d 724, 157 P.2d 927 (1945). Evidence of long past acts or omissions was irrelevant, confusing and prejudicial and should have been excluded under ER 402 or 403.

Evidence of fiscal constraints. Plaintiffs misconstrue the Department's argument regarding when fiscal constraints may be considered.

Courts that have held lack of funding is not a defense to a constitutional violation, have also established a minimum constitutional standard below which the state's conduct may not fall. In such cases, the Department agrees that a lack of resources would not justify the states' violation of a fundamental liberty interest. *See, e.g., In Re J.S.*,124 Wn.2d 689. However, where the constitutional standard is described in negligence terms, such as "reasonableness" or compliance with "best practice" standards or "standards of excellence," the minimum constitutional standard is less clear. In such cases, what is reasonable, above any minimum required, may include a consideration of financial resources available to the state. *In Re J.S.*, 124 Wn.2d at 700.

Evidence of professional standards. Plaintiffs contend that evidence about standards set by and for pediatricians and the "best practice" standards set by the Child Welfare League of America (CWLA) were relevant and necessary to determine whether the Department's "practices" substantially departed from those standards.

Had the substantive due process right been carefully described, and had the proper liability standard – deliberate indifference – been applied, the evidentiary issues relating to these irrelevant standards would be moot.

However, if this Court were to hold that the *Youngberg* liability standard applies in cases in which foster children allege a violation of a substantive due process right, then the appropriate *constitutional* standard would evaluate professional decisions based on the minimum – not the optimum – standards for Washington's child welfare system. *See*

Youngberg, 457 U.S. at 319 (person involuntarily confined in mental institution has a right to *minimally adequate* or *reasonable* training to ensure safety and freedom from undue restraint); *In re J.S.*, 124 Wn.2d at 700 (constitutionally significant issue in developing treatment plan for an individual in a mental institution is not whether the optimal course of treatment should be offered but whether the treatment offered is adequate and reasonably based on professional judgment).

Contrary to the Plaintiffs' assertions, the Department has not argued that Washington acts without child welfare standards, but that this state's standards have been established by the Legislature in statutes that require the Department to make professional judgments that provide adequate care, within appropriated funds. *See* RCW 74.13.075, .100, .109, .170, .200, .280, .285, .320, .325, .340, RCW 74.14A.050, RCW 74.14B.020, .070, .080, RCW 74.14C.005(1), (2), .100, .220, .230 (All of which limit implementation of certain foster care services or programs according to "available resources.")

The CWLA standards, which are titled "Child Welfare League of America Standards of Excellence," are not standards that set a constitutional minimum. The two cases cited by Plaintiffs in support of their claim that courts "routinely look to the Child Welfare League of America for standards governing foster care," Br. Resp't at 54, do not support Plaintiffs' argument. *Doe By & Through G.S. v. Johnson*, 52 F.3d 1448 (7th Cir. 1995), held that the CWLA standards could be considered, along with state statutes and regulations, in determining a negligence

claim. The other case, *LaShawn A. v. Dixon*, 762 F. Supp. 959, 964 (D.D.C. 1991), is a case out of the District of Columbia in which the trial court states that District "law requires the staff qualifications, caseload levels, and supervision requirements of the District's [Child and Family Services Division] to be guided by the standards set out by the Child Welfare League of America or other child welfare organizations." That is not the case in Washington. The minimum standards here are set by statute.[22]

Additionally, the Legislature has authorized the Department to pursue accreditation through the Council on Accreditation (COA), whose standards are not the same as the CWLA standards. RP 2679. COA does not require a state to meet every standard but, instead, requires a median level of compliance. The federal government also is in the process of reviewing the practices of all states to ensure substantial conformity with national standards in several areas.[23] Substantial conformity is measured based on a comparison with all other states.[24] The federal review does not determine whether any particular practice falls below an articulated

[22] Plaintiffs' unsupported implication in Br. Resp't at 55, n. 39, that Washington is in violation of federal law requiring states to maintain standards for foster homes and child care institutions, is not true. Washington's standards for licensed foster home and child placing agencies, contained in WAC 388-148, meet federal requirements. Moreover, these were not the standards by which Plaintiffs sought to measure the Department's conduct, primarily because compliance with these standards is expressly conditioned on financial resources available to the Department

[23] A description of the standards and the measures applied, as well as current results of reviews that have been completed, are available online at the Department of Health and Human Services website, http://www.childwelfarereview.com.

[24] Significantly, the jury below was prevented from hearing comparisons of Washington's foster care system with those of other states. *See* Br. of Appellant at 61-62.

standard, but whether the state's system, as a whole, substantially conforms to national standards. If not, the federal agency works with the state to develop an improvement plan. *See http://www.childwelfarereview.com.*

While the Department agrees that the CWLA Standards of Excellence are laudable goals and are examples of "best practices," or optimal care, they do not set the minimum and *constitutional* standard below which a child welfare agency's actions may not fall and they should not have been admitted.

The Ombudsman's Report. Plaintiffs try to justify the trial court's admission of the Ombudsman's reports, Exhibits 173 and 174, by saying they are only *annual reports* containing *only* "general information regarding the operation of . . . the ombudsman's office." Br. Resp't at 62.

The reports were not used at trial to provide "general information." Instead, the hearsay statements contained in the reports were used to prove *facts*. The Department had no knowledge of the underlying basis for the statements made in the reports, no opportunity to cross examine persons who may have made "reports" to the ombudsman, and no opportunity to question the author of the report. Under ER 801, the reports should not have been admitted to prove the hearsay facts they alleged, including the *only* evidence that children were placed or kept by the courts in juvenile detention facilities after the legal term for confinement had ended. Ex. 173 at 42. Furthermore, the use of the Ombudsman's Report was barred by RCW 43.06A.060.

E. The Injunction Entered By The Trial Court Is Not Justified Under Plaintiffs' Current Theory Of The Case -- Or By The Verdict.

Plaintiffs respond to the Department's argument that the injunction is overly broad and improper by attempting to justify the terms of the injunction and its breathtaking scope on the basis that the jury found the state had violated the Plaintiffs' constitutional right "to be treated in a manner which does not substantially depart from professional judgment, standards or practice." Br. Resp't at 71.

The Plaintiffs' former theory of the case would have imposed no boundaries on the duties imposed upon the child welfare system, nor on the limitless services that might conceivably be available to children under a "best practices" standard. The injunction reflects that boundless approach to meeting the then-asserted "constitutional" duties of the state toward providing optimal care and treatment for foster children.

Plaintiffs now claim that because the Department did not propose an alternative injunction, the Department should be foreclosed from challenging the terms and breadth of the trial court's invasive injunction. Br. Resp't at 72. That's absurd. The responsibility for preparing an order or judgment falls on the prevailing party. CR 54(e). Plaintiffs cite no authority to support their assertion that the Department's right to appeal the inappropriate terms of an injunction order is somehow conditioned on an affirmative duty to assist Plaintiffs in fashioning the language of their order.

Plaintiffs are correct in their understanding that the Department does not agree that the best way to administer child welfare services is pursuant to a court order. Decisions establishing public policy in the child welfare arena, as well as those allocating public funds, are best made by the Legislature. While the Department acknowledges the zeal of Plaintiffs' attorneys, that alone does not provide sufficient expertise or experience to create and administer child welfare programs.

Even the most dedicated advocates of foster children – the social workers, foster parents, juvenile court judges, agency administrators, guardians ad litem and CASA volunteers, who day after day, week after week, year after year, deal with the complex problems of individual children and of the child welfare system, and who willingly accept the awesome responsibility for making the emergent and difficult decisions necessitated by their positions – are not so naive as to attempt to fashion an order aimed at "fixing" the entire child welfare system. The system is not perfect, nor will it ever be, and a trial court's injunction will not make it so. Moreover, perfection is not what the constitution requires.

Plaintiffs fail to specifically address the Department's arguments that the trial court abused its discretion in entering an injunction that is based on untenable factual and legal grounds and that is not narrowly tailored. *Lewis v. Casey*, 518 U.S. 343; *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); *Tyler Pipe*, 96 Wn.2d at 792; *Kitsap County v. Kev, Inc.,* 106 Wn.2d 135, 143, 720 P.2d 818 (1986).

They respond to the Department's argument that specific factual findings should have been made by the jury with respect to each purported violation addressed in the injunction by claiming the Department should have drafted these findings and presented them as a jury verdict form. Once again they evidence a misunderstanding of their responsibility as the moving party in the litigation. It is the Plaintiffs' responsibility—not that of the Department—to draft the findings necessary to support the order sought by the Plaintiffs. It is well-settled Washington law that the absence of a finding of fact on a material issue is *presumptively* a negative finding *against* the party who bore the burden of proof, not against the defending party. *Smith v. King*, 106 Wn.2d 443, 722 P.2d 796 (1986). Further, precise, not conclusory, findings of fact are essential for proper appellate review. *See, e.g., Knox v. Salinas*, 193 F.3d 123, 128-29 (2nd Cir. 1999); *Oakley, Inc. v. International Tropic-Cal, Inc.*, 923 F.2d 167, 168-69 (Fed. Cir. 1991).

In this case, the jury, not the judge, was the finder of fact and only a conclusory finding was made. In an action for injunctive relief based on constitutional grounds, a "remedy cannot . . . go beyond the constitutional violations found." *Inmates of Alleghany County Jail v. Wecht*, 874 F.2d 147, 153 (3rd Cir. 1989), *judgment vacated,* 493 U.S. 948 (1989). The jury below found a *general* violation of an erroneously described constitutional right, and such a finding does not and cannot support the injunction that was entered.

Instead of responding to the Department's arguments, Plaintiffs argue against issues not raised, rely on a constitutional right they have already disavowed, and essentially claim that the trial court had no limits on what it could order the Department to do in creating its concept of the perfect system.

Plaintiffs begin with the inexplicable assertion that the Department cited no authority in support of its position. Beginning on page 41 and continuing through page 60 of the Brief of Appellant, the Department sets out this Court's standards for issuing and reviewing mandatory injunctions and, section-by-section, demonstrates that the injunction not only is not supported by the facts or by law, it is extraordinarily and unnecessarily broad.

Next, Plaintiffs refute what they describe as the Department's reliance on the separation of powers doctrine to challenge "any remedy, such as licensing additional foster homes, that might require the State to spend money." Br. Resp't at 74. There is no such argument in the opening brief.

What the Department *does* challenge is the trial court's authority under the separation of powers doctrine to order the Department to hire and pay for an independent person or entity to conduct a series of studies of the child welfare system. CP 152. This is an allocation of public funds by a superior court judge and, despite Plaintiffs' argument to the contrary, does not remedy any constitutional violation – not even a violation of one of the various rights Plaintiffs have alleged at different stages of this

proceeding. It is simply beyond the trial court's authority. *Pannell v. Thompson*, 91 Wn.2d 591, 598-99, 589 P.3d 1235 (1979).

Plaintiffs incorrectly assert that the Department has argued that the injunction's provisions ordering it to consult with others is "tantamount to the trial court issuing orders to non-parties." Br. Resp't at 77. What the Department actually argued is that the trial court's order improperly mandates that non-parties take certain actions. For example, the injunction requires, in cases where a child moves from one school to another, "at a minimum, . . . the two schools communicate all the relevant data on the child." CP 146. The schools and school districts are not parties to this action and can not be bound by the order. *See All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 998 P.2d 367 (2000).

Plaintiffs assert that the injunction's requirement that the Department provide "the child's DSHS file" (CP 147) to a prospective foster parent prior to placing a child does not conflict with the state and federal laws governing confidentiality of child welfare files. This argument reflects their complete lack of understanding of both the law and the nature of the records contained in "the child's DSHS file." None of the statutes cited by Plaintiffs requires or permits the "child's DSHS file" to be turned over to foster parents. These files—often boxes of files—contain extensive personal and private information, not only about the child, but also about the parents, siblings, other foster families, relatives and other foster children. Taking social worker time to redact identifying and protected information from the files before placing a child in a foster

home would significantly delay placement for no reason, and take social workers away from far more pressing duties. The statutes fully cover the scope and nature of the information that foster parents need to adequately care for the child's needs. RCW 74.13.280, .285. The breadth of the injunction on this issue goes well beyond the statutes – both federal and state – and well beyond a child's needs. Certainly, it goes well beyond any constitutional requirement.

Plaintiffs dismiss the Department's argument that the injunction creates a conflict between the Department's duties required by statute and those required under the injunction. Br. Resp't at 82-85. The injunction conflicts with statutory mandates, as set forth in the Department's opening brief. Br. of Appellants at 51, 52, 53, 54, 55, 56, 58, 59, 60. Plaintiffs' response to this conflict is essentially that if the injunction and the statutes impose conflicting requirements, then the statutes must yield to the trial court's ruling that the constitutional rights of foster children have been violated. Again, the specific constitutional right was never described, and there has been no showing that any Washington statute relating to foster care violates any constitutional requirement.

The Plaintiffs' accusation that the state would have the trial court do nothing to remedy widespread violations of children's constitutional rights is mean spirited and unfair. It deliberately ignores the many significant improvements to the child welfare system that the Department has made and continues to make, improvements that Plaintiffs' witnesses

acknowledged. All the Department is asking this Court to do is what any litigant would ask—that an erroneous trial court decision be corrected.

F. The Plaintiffs Fail To Respond To The Department's Arguments That The Class Certified By The Trial Court Was Too Broad.

The Plaintiffs' witnesses did not support the trial court's ultimate definition of the class. In their brief in response to the Department's opening brief, Plaintiffs fail to respond to the arguments based on their witnesses' testimony that three placements is not the event which causes harm. *See* Br. of Appellant at 70-72. Instead, Plaintiffs rely on "best practice" standards to show what the ideal number of placements should be. Br. Resp't at 87-88.

The question involved here was whether three placements was, on its own, a solid ground for defining the Plaintiff class. As the Plaintiffs' witnesses and the Department's opening brief demonstrate, it is not. In certifying the class as children who will experience three or more placements and, later, in failing to redefine the class to conform to the evidence, the trial court erred.

CONCLUSION

The Department respectfully submits this Court should reverse the trial court and dismiss the constitutional claim of the Plaintiff class.

RESPONSE TO PLAINTIFFS' CROSS APPEAL

A. Counterstatement Of The Case

The Department does not dispute those facts set forth in Plaintiffs' brief on their cross appeal. Br. Resp't at 94-95. However, Plaintiffs make conclusory "factual" statements in their Argument section that are not supported by a citation to the record. *See, e.g.,* Br. Resp't at 110-11 ("Placements frequently fall apart because the needs of the child are not being adequately addressed in the current placement, and a new placement requires a new plan."), or which are not supported by the citation given. *See, e.g.,* Br. Resp't at 96. (Evidence showed the Department failed to provide "reasonable treatment to address [the Plaintiffs'] serious mental and behavioral problems.")

The following additional facts are necessary for a proper background in deciding the issues presented. This case was filed in August 1998. CP 4171. On March 31, 2000, Plaintiffs were granted leave to file a Second Amended Complaint that added then DSHS Secretary Lyle Quasim as a defendant. CP 4149-50. Mr. Quasim was sued in both his personal capacity and his official capacity as Secretary of DSHS. CP 4140.

On June 1, 2001, the Court granted partial summary judgment dismissing, with prejudice, all claims for damages brought against defendant Quasim in his personal capacity under 42 U.S.C. § 1983. CP 3041-44. The following month, about two months before trial, Plaintiffs moved for leave to file a Third Amended Complaint adding new causes of

action and seeking to add Dennis Braddock as a named defendant. CP 2063-81. Dennis Braddock had succeeded Lyle Quasim as Secretary of DSHS about a year earlier, in July 2000. RP 2892. The Court denied Plaintiffs' Motion for Leave to file the Third Amended Complaint on August 9, 2001. Accordingly, the case proceeded to trial under the Second Amended Complaint, with DSHS and defendant Quasim in his official capacity as the only named defendants.

On November 26, 2001, after Plaintiffs had rested their case-in-chief, the Department moved for dismissal of all claims against Lyle Quasim, pursuant to CR 50(a)(1), due to insufficient evidence of liability or causation. CP 868-77. The basis of the motion was that Mr. Quasim was the only individually named defendant in the case, and Plaintiffs offered no evidence establishing that Mr. Quasim violated any rights of the Plaintiff class.

The Court granted the motion, ruling, in pertinent part: "Defendants' CR 50 motion to dismiss plaintiffs' claims against the sole individually named defendant, Lyle Quasim, is GRANTED with prejudice." CP 843.

Two months after the verdict was rendered in this case, Plaintiffs filed a motion for leave to file a Fourth Amended Complaint. CP 656. In this motion, Plaintiffs sought to "substitute" Dennis Braddock for Lyle Quasim, even though all claims against Mr. Quasim were dismissed with prejudice as a matter of law. CP 653-55. That motion was denied. CP 160-61.

ARGUMENT

A. Foster Children Do Not Have A Private Right Of Action Under Case Plan Provisions Of The Adoption Assistance And Child Welfare Act Of 1980, 42 U.S.C. § 671(a)(16) And § 675(1).

Plaintiffs claim they have an enforceable right to an injunction under 42 U.S.C. §§ 671(a)(16) and 675(1). These provisions are part of the Adoption Assistance and Child Welfare Act of 1980 (Act), 42 U.S.C. §§ 620-628 and §§ 670-679.

The federal statute was enacted by Congress pursuant to its spending power. *Suter v. Artist*, 503 U.S. 347, 356, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992). The Act sets up a mechanism by which a state may participate in federal funding, provided certain conditions are met.

Section 671 of the Act sets out the contents of the state plan which must be approved before the state may receive any federal foster care funds. Section 675 is the definition section of the Act.

These sections provide, in pertinent part:

§ 671. State plan for foster care and adoption assistance.

(a) Requisite features of State plan

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
> . . .
> (16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 675(5)(B) of this title with respect to each such child.[25]

[25] Note that "case plan" is plainly used in the singular, and is not used synonymously with a "case review system" for subsequent changes in circumstance.

42 U.S.C. § 671. There is no dispute Washington has such a plan, approved by the Secretary of the United States Department of Health and Human Services (HHS).

> § 675(1). Definitions
>
> As used in this part or part B of this subchapter:
>
> (1) The term "case plan" means a written document which includes at least the following:
>
> (A) A description of the type of home or institution in which a child is to be placed . . . .
>
> (B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child . . . and address the needs of the child while in foster care . . . .
>
> (C) To the extent available and accessible, the health and education records of the child . . . .
>
> (D) Where appropriate, for a child age 16 or over, a written description of the programs and services which will help prepare the child for transition from foster care to independent living.
>
> (E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency has taken to find an adoptive family or other permanent living arrangement for the child . . . .

42 U.S.C. § 675(1).

The Supreme Court recently clarified the standard that applies in determining whether a statute, enacted pursuant to Congress's spending power, creates a right of action. *Gonzaga University v. Doe*, ___ U.S.____, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). The Court

acknowledged that their prior cases, including *Suter* and *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997), had created some confusion. Those cases hold that in considering whether a federal statute creates enforceable private rights, a court should consider three questions: (1) Was the provision in question intended to benefit the plaintiffs? (2) Does the statutory provision in question create binding obligations on the state, rather than merely expressing a congressional preference? and (3) Is the interest plaintiffs assert specific enough to be enforced judicially, rather than being vague and amorphous? *See, e.g., Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). The *Gonzaga* Court made the standard clear:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section.

Gonzaga, 122 S. Ct. at 2275 (emphasis original). The Court went on to hold that the first inquiry in determining whether a right exists is "whether Congress *intended to create a federal right*." *Gonzaga*, 122 S. Ct. at 2275 (emphasis original). "[W]here the text and structure of a statute provide no indication that congress intends to create new individual rights, there is no basis for a private suit." *Gonzaga*, 122 S. Ct. at 2277.

Like the statute examined in *Gonzaga*, the statute involved here is a federal-to-state funding statute. There is nothing in the Act to indicate

Congress intended to confer an individual right that would support a cause of action under 42 U.S.C. § 1983.

Although *Gonzaga* was not decided at the time Plaintiffs' federal claim was dismissed, the trial court determined that dismissal was appropriate under *Washington Coalition*.

Plaintiffs are not seeking to enforce the specific case plans of individual foster children. They ask this Court to hold that 42 U.S.C. § 671(a)(16) *generally* mandates that case plans are required to be revised when a child is moved from one home to another. Such a claim is untenable under *Washington Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 949 P.2d 1291 (1997).

Washington Coalition was a class action for injunctive relief. One of the plaintiffs' claims was that 42 U.S.C. § 671(a)(16) required implementation of "case plans" for the members of the class, including "housing assistance where necessary to prevent or shorten the need for foster care placement of homeless children." *Washington Coalition*, 133 Wn.2d at 900. This Court, after analyzing the applicable statutory and case law, held:

> The Department argues that plaintiffs cannot show that the interests they assert are specific enough to be enforced judicially. We agree. While the provisions of any individual case plan may be specific enough to be enforced judicially, the notion that case plans in general are to be implemented is too vague and amorphous to be enforced. Any enforcement would have to await a particular case plan.
>
> In the context of the relief requested by plaintiffs [that §671(a)(16) generally required the implementation of "case

> plans" that included housing assistance], the statutory language here is too amorphous and vague to be enforced.

Consequently, *Washington Coalition* held there is no right to enforce 42 U.S.C. § 671(a)(16) -- the same statutory section that Plaintiffs in this case argue creates an enforceable right.

Similarly, in *Suter*, the Supreme Court held there was no private right of action to enforce the subsection of § 671(a), which requires the state plan to provide "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return home." § 671(a)(15).

Washington Coalition, Suter and *Gonzaga* not only support the trial court's dismissal of the federal claims, they require it. There is no right on the part of foster children to *generally* enforce a mandate that case plans be updated when a child moves from one placement to another.

As a practical matter, each dependent child who is in foster care is the subject of an action in juvenile court. Each child's case plan is submitted to the court for review at the initial disposition hearing and is updated and reviewed at least every six months for an additional review by the juvenile court. RCW 13.34.

Additionally, compliance with the state plan is monitored by the HHS, the federal agency charged with administering the Act.

There is no need for an injunction to enforce the provisions of 42 U.S.C. § 671(a)(16). There was no evidence presented to show that any member of the Plaintiff class was harmed by an alleged failure of the

Department to immediately update the case plan when a child's placement changed.

B. Foster Children Do Not Have A Private Right Of Action Under RCW 74.14A.050, RCW 74.13.250 Or RCW 74.13.280.

The trial court dismissed Plaintiffs' claims for injunctive relief based on three Washington statutes. CP 904-05. The Plaintiffs assert this was error, arguing the statutes create a private right of action under the law established by *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) and *Washington Coalition*.

The trial court correctly ruled that Plaintiffs do not have a cause of action under the statutes.

1. The provisions of RCW 74.14A.050(2) and (3) do not create a private right of action.

RCW 74.14A.050 provides in pertinent part:

> The secretary [of DSHS] shall:
>
> (1)(a) Consult with relevant qualified professionals to develop a set of minimum guidelines to be used for identifying all children who are in a state-assisted support system, whether at-home or out-of-home, who are likely to need long-term care or assistance, because they face physical, emotional, medical, mental, or other long-term challenges;
> (b) The guidelines must, at a minimum, consider the following criteria for identifying children in need of long-term care or assistance:
> (i) Placement within the foster care system for two years or more;
> (ii) Multiple foster care placements;
> (iii) Repeated unsuccessful efforts to be placed with a permanent adoptive family;
> (iv) Chronic behavioral or educational problems;
> (v) Repetitive criminal acts or offenses;

(vi) Failure to comply with court-ordered disciplinary actions and other imposed guidelines of behavior, including drug and alcohol rehabilitation; and

(vii) Chronic physical, emotional, medical, mental, or other similar conditions necessitating long-term care or assistance;

(2) Develop programs that are necessary for the long-term care of children and youth that are identified for the purposes of this section. Programs must: (a) Effectively address the educational, physical, emotional, mental, and medical needs of children and youth; and (b) incorporate an array of family support options, to individual needs and choices of the child and family. The programs must be ready for implementation by January 1, 1995;

(3) Conduct an evaluation of all children currently within the foster care agency caseload to identify those children who meet the criteria set forth in this section. *All children entering the foster care system must be evaluated for identification of long-term needs within thirty days of placement;*

(4) As a result of the passage of chapter 232, Laws of 2000, the department is conducting a pilot project to do a comparative analysis of a variety of assessment instruments to determine the most effective tools and methods for evaluation of children. The pilot project may extend through August 31, 2001. The department shall report to the appropriate committees in the senate and house of representatives by September 30, 2001, on the results of the pilot project. The department shall select an assessment instrument that can be implemented within available resources. The department shall complete statewide implementation by December 31, 2001. The department shall report to the appropriate committees in the senate and house of representatives on how the use of the selected assessment instrument has affected department policies, by no later than December 31, 2002, December 31, 2004, and December 31, 2006;

(5) Use the assessment tool developed pursuant to subsection (4) of this section in making out-of-home placement decisions for children;

(6) By region, report to the legislature on the following using aggregate data every six months beginning December 31, 2000:

(a) The number of children evaluated during the first thirty days of placement as required in subsection (3) of this section;

(b) The tool or tools used to evaluate children, including the content of the tool and the method by which the tool was validated;

(c) The findings from the evaluation regarding the children's needs;

(d) How the department used the results of the evaluation to provide services to the foster child to meet his or her needs; and

(e) Whether and how the evaluation results assisted the department in providing appropriate services to the child, matching the child with an appropriate care provider early on in the child's placement and achieving the child's permanency plan in a timely fashion;

(7) Each region of the department shall make the appropriate number of referrals to the foster care assessment program to ensure that the services offered by the program are used to the extent funded pursuant to the department's contract with the program. The department shall report to the legislature by November 30, 2000, on the number of referrals, by region, to the foster care assessment program. If the regions are not referring an adequate number of cases to the program, the department shall include in its report an explanation of what action it is or has taken to ensure that the referrals are adequate;

(8) The department shall report to the legislature by December 15, 2000, on how it will use the foster care assessment program model to assess children as they enter out-of-home care;

(9) The department is to accomplish the tasks listed in subsections (4) through (8) of this section within existing resources;

(10) Study and develop a comprehensive plan for the evaluation and identification of all children and youth in need of long-term care or assistance, including, but not limited to, the mentally ill, developmentally disabled, medically fragile, seriously emotionally or behaviorally disabled, and physically impaired;

(11) Study and develop a plan for the children and youth in need of long-term care or assistance to ensure the coordination of services between the department's divisions

> and between other state agencies who are involved with the child or youth;
>
> (12) Study and develop guidelines for transitional services, between long-term care programs, based on the person's age or mental, physical, emotional, or medical condition; and
>
> (13) Study and develop a statutory proposal for the emancipation of minors.

RCW 74.14A.050. (Emphasis added.)

It is the emphasized sections of the statute that the trial court ruled did not create a private right of action and that Plaintiffs seek to enforce by mandatory injunction.

In *Bennett*, this Court articulated three issues that must be resolved in considering whether to imply a cause of action based on a statutory duty. Those issues are: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Bennett*, 113 Wn.2d at 920-21. *See also Washington Coalition,*133 Wn.2d at 912-13.

The Department agrees that foster children are within the class of persons for whose benefit this statute was enacted. Thus the Department agrees that the first issue in the *Bennett* test is satisfied. However, neither the second nor the third *Bennett* question can be answered in the affirmative. The *Bennett* analysis does not support the recognition of a private right of action under either RCW 74.14A.050(2) or (3).

The legislative intent does not support the creation of private right of action. The intent of the Legislature, as set forth in the statute itself, is to establish a process for identifying "all children who are in a state-assisted support system, whether at-home or out-of-home, who are likely to need long-term care or assistance, because they face physical, emotional, medical, mental, or other long-term challenges." RCW 74.14A.050(1)(a). The process to be used for evaluating foster children is the assessment called for in subsection (3). The purpose of the assessment is to aid the Department in developing an appropriate case plan for child so that the child might participate in the programs developed under subsection (2).

The Legislature did not intent to create a private right of action for enforcing this statute, generally, by injunction. An avenue for enforcement of any individual rights under the statute already exists under the provisions of RCW 13.34, the dependency statute, which provides for judicial oversight over each child's treatment while in foster care. *See, e.g.,* RCW 13.34.120, .130, .138. Additionally, the Legislature, itself, has assumed responsibility for monitoring the Department's compliance with the statute's purpose. RCW 74.14A.050(4) through (8).

Implying a private remedy of injunction that would authorize judicial monitoring of the Department's performance of its obligations under RCW 74.14A.050(3) is inconsistent with the rights and duties delegated to the juvenile court and to the Legislature under the child welfare statutes and, specifically, to the Legislature under this statute.

Plaintiffs argue that a provision in a Substitute House Bill which was introduced in the 2001 Legislative session *and which did not pass* is evidence of legislative intent to create a private right of action. The bill, SHB 1249, authorizes the Department to pursue accreditation. Five of seven sections in the substitute bill were dropped from the final bill that passed the Legislature. One of these omitted sections would have moved RCW 74.14A.050 to RCW 74.13. Another would have clarified that "nothing in this act" (the act authorizing the pursuit of accreditation) should be construed as creating a private right of action. SHB 1249, § 6, 57th Leg. (2001); SSHB 1249, § 4, 57th Leg. (2001). The fact that the Legislature did not include these sections in the final bill does not support even an inference that the Legislature intended to create a private right of action to enforce RCW 74.14A.050(3). In *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694 (1996), this Court stated the law in this regard as follows:

> As a general principle, we are loathe to ascribe any meaning to the Legislature's failure to pass a bill into law. . . . [I]t is pure speculation that the Legislature's failure to pass [this bill] . . . was an expression of the Legislature's view on the issues before us.

It is pure speculation on the part of the Plaintiffs to read a legislative intent into the deletion of proposed sections of bill before passage.

2. The foster parent training and information provisions of RCW 74.13.250 and RCW 74.13.280 do not create a private right of action in foster children.

RCW 74.13.250 requires foster parents to receive training prior to being licensed. *See also* RCW 74.14B.020 (limiting provision of foster parent training to "within funds appropriated for this purpose").

RCW 74.13.280 requires the Department or child-placing agency to share information about a foster child and the child's family with the care provider and consult with the care provider regarding the child's case plan.

The Department concedes for purposes of argument that foster children, rather than foster parents, are within the class of persons for whose benefit these statutes were enacted. It does not agree that the Legislature, in enacting these statutes, intended to create a private right of action and does not agree that implying a private remedy would be consistent with the underlying purposes of the legislation.

The intent of these statutes is to provide a guideline and authority for (1) providing foster parent training and (2) personal and private information about a child to the foster parent. There is no indication in these statutes that a private right of action was intended or contemplated. Again, responsibility for judicial oversight of an individual child's case, for determining whether the case plan is adequate, and the foster parents suitable, is best left to the juvenile court in which the dependency is heard – the forum which has jurisdiction over the individual child.

Plaintiffs argue that *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998), applies by analogy. It does not. This Court in *McKinney* did not hold that the disclosure provisions in the adoption statute, RCW 26.33.350 and RCW 26.33.380, were enforceable under a private right of action for injunction. Instead, the Court held that the Department had a duty to disclose medical and social history and that a breach of that duty could be grounds for an action in negligence. *McKinney*, 134 Wn.2d at 466. It again warrants mention that, here, the plaintiff class representatives' tort claims were settled pre-trial.

Relying on *Washington Coalition,* Plaintiffs assert that the Legislature's use of the word "shall" and "must" in the four statutes they seek to enforce by injunction confer rights to the Plaintiffs that are presumed to be enforceable by injunction. Brief of Resp't at 103-04. The fact that a statute uses mandatory terms does not indicate the Legislature intended to create a private right of action.

Statutes that impose a mandatory duty on an agency generally also grant discretion to the agency to determine how best to carry out those duties. *Roberts v. King County,* 107 Wn. App 806, 812, 27 P.3d 1267 (2001). Such is the case with the child welfare statutes at issue here. An agency may not disregard the clear language of the statute, which was the case in *Washington Coalition.* If it does refuse to recognize its statutory duty, it acts in an arbitrary manner and courts may interfere to require the agency to perform its duty. *Washington Coalition*, 133 Wn.2d at 914. However, if an agency exercises its discretion in a manner that is lawful

and reasonably based, then its action must be upheld, even though the reviewing court may believe the action to be erroneous. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Together, *Hillis* and *Washington Coalition* "establish that while agencies have procedural discretion in how they exercise their duties, that discretion does not permit them to completely refuse those duties." *Roberts*, 107 Wn. App. at 814. *See also Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 39 P.3d 961 (2002).

In the present case Plaintiffs do not claim that the Department is failing to implement the statutes they seek to enforce. Instead, their complaint is that the Department is not implementing the statutes to Plaintiffs' satisfaction. This is simply not enough to justify judicial interference with the work and decisions of a state agency. *Washington Coalition*, 133 Wn.2d at 914.

The trial court properly dismissed the Plaintiffs' statutory claims and its rulings should be affirmed.

C. The Trial Court Properly Denied The Plaintiffs' Post-Trial Motion To Amend Their Complaint.

Plaintiffs' argument that the trial court abused its discretion in denying their request to "substitute" Secretary Braddock for former Secretary Quasim is based on two erroneous premises. The first is that an injunction entered against a state, pursuant to 42 U.S.C. § 1983, must be against an individual state official. The second is that Lyle Quasim was – or is – still a party to the case who can be "substituted."

The § 1983 cases to which the Plaintiffs refer, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), and *Washington State Republican Party v. Public Disclosure Comm'n*, 141 Wn.2d 245, 4 P.3d 808 (2000), hold that neither a state nor a state official acting in his or her official capacity, is a "person" under the federal Civil Rights Act. In *Republican Party*, 141 Wn.2d at 285-86, this Court explained:

> Violations of the federal constitution may be remedied under § 1983. However, suit may not be brought under § 1983 in state court against the state or against a state official acting in an official capacity because a state is not a "person" subject to suit within the meaning of § 1983.

(Citation and footnote omitted.) The Court also noted, however, that "suits for injunctive relief are not barred." *Republican Party*, 141 Wn.2d at 286 n. 17 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. at 71, n. 10).

The injunction entered in this case was entered against the Department and there is no need to name an individual state official. *See Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1994). Plaintiffs cite no authority requiring the naming of an individual defendant in an injunctive action against a state agency.

Although Plaintiffs argue that Secretary Braddock should be "substituted" for former Secretary Quasim, their motion was not a motion to substitute, but a motion to amend their Complaint to add a party. That motion was made two months after the jury rendered its verdict and nearly two years after Dennis Braddock assumed the office of Secretary of the

Department of Social and Health Services. At the time they made their motion, there was no remaining "official" for whom to substitute. All claims against Mr. Quasim had been dismissed. Plaintiffs have not challenged the trial court's order granting the dismissal of Lyle Quasim from the lawsuit based on lack of evidence, thus that decision is final. There also was no opportunity for Secretary Braddock to individually defend against the claims, after the verdict had been rendered.

Plaintiffs also argue that CR 15(c) requires leave to amend a pleading to add a new party "to substitute the correct party" against whom a ruling is made.

This Court recently considered the application of the second sentence of CR 15(c) in *Stansfield v. Douglas County*, 146 Wn.2d 116, 43 P.3d 498 (2002). In that case this Court held that an amendment adding a new party to the action, pursuant to CR 15(c) is not allowed

> "if the plaintiff's delay is due to inexcusable neglect." "[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record." Under the same rubric, "a conscious decision, strategy or tactic" prevents relation back of an amendment adding a party. The inexcusable neglect rule must be satisfied in addition to the requirements of the second sentence of CR 15(c).

Stansfield, 146 Wn.2d at 122 (citations omitted).

In the present case, the Plaintiffs can demonstrate no reason for failing to name Dennis Braddock or to substitute him prior to trial in the case. Whether a conscious decision, strategy or tactic, or simply inattention, the Plaintiffs failed to move to substitute for many, many

months after they knew that Mr. Quasim was no longer Secretary of the Department. The record does not show that this neglect was excusable, and the Plaintiffs therefore can not meet the second prong of the CR 15(c)/*Stansfield* test.

Plaintiffs' assertion that RAP 3.2(f) applies here is inapposite. The rule provides for *substitution* of a party who is a public officer if, during the course of a proceeding, the public officer resigns. However, because all claims against Lyle Quasim were dismissed with prejudice, there is no public officer for whom to substitute. The trial court correctly rejected their motion.

CONCLUSION

For the reasons stated above, the Department submits that the trial court's dismissal of Plaintiffs' claims based on federal and state law and its ruling on the Fourth Amended Complaint should be affirmed.

RESPECTFULLY SUBMITTED this _____ day of November, 2002.

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